No. 76-6528

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

DAVID WAYNE BURKS, PETITTONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

DANIEL M. FRIEDMAN,
Acting Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Petitioner contends that the Double Jeopardy Clause bars retrial in this case because the court of appeals reversed his conviction.

Following a jury trial in the United States District Court for the Middle District of Tennessee, petitioner was convicted of one count of armed bank robbery in violation of 18 U.S.C. 2113(a) and (d). He was sentenced to a term of twenty years' imprisonment. The court of appeals found the government's evidence on the issue of sanity insufficient and reversed and remanded the case "to the district court for a determination of whether a directed verdict of acquittal should be entered or a new trial ordered" (Pet. App. at 970). Petitions for rehearing filed by both petitioner and the United States were denied on February 8, 1977. The petition for a writ of certiorari was not filed until April 11, 1977, and is therefore substantially out of time under Rule 22(2) of the Rules of this Court.

At trial petitioner admitted committing the offense charged against him and relied solely on the defense of insanity. The court of appeals found that the testimony of the government's expert and lay witnesses on the issue of insanity had not effectively rebutted petitioner's prima facie showing through the testimony of his expert witnesses that he was unable to conform his conduct to the requirements of the law he was charged with violating. See United States v. Smith, 404 F.2d 720, 727 (C.A. 6). Relying on its authority under 28 U.S.C. 2106 to "require such further proceedings to be had as may be just under the circumstances,"[1/] and noting that petitioner had moved for a new trial, the court of appeals remanded the case for a hearing to determine whether the government has additional evidence to present on the issue of petitioner's sanity. Following this hearing, the district court is either to direct a verdict of acquittal or to order a new trial (Pet. App. at 970). In so doing, the court of appeals expressly adopted the standards and procedures outlined by the Fifth Circuit in United States v. Bass, 490 F.2d 846, 852-853, as the guide for the district court (Pet. App. at 970):

1/ 28 U.S.C. 2106 states in pertinent part:

> The Supreme Court or any other court of appellate jurisdiction may . . . vacate . . . any judgment . . . brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order or require such further proceedings to be had as may be just under the circumstances.

> [W]e reverse and remand the case to the district court where the defendant will be entitled to a directed verdict of acquittal unless the government presents sufficient additional evidence to carry its burden in the issue of defendant's sanity. As we noted earlier, the question of sufficiency of the evidence to make an issue for the jury on the defense of insanity is a question of law to be decided by the trial judge. * * * If the district court, sitting without the presence of the jury, is satisfied by the government's presentation, it may order a new trial. * * * Even if the government presents additional evidence, the district court may refuse to order a new trial if he finds from the record that the prosecution had the opportunity fully to develop its case or in fact did so in the first trial. * * *

Petitioner's contention that the court of appeals was powerless under 28 U.S.C. 2106 to do anything but order the entry of a judgment of acquittal after it found the government's evidence on the issue of his sanity insufficient is foreclosed by Bryan v. United States, 338 U.S. 552. There this Court held that, where one seeking reversal of his conviction assigns a number of alleged errors on appeal, including denial of a motion for a new trial, the double jeopardy clause does not bar a second trial ordered pursuant to 28 U.S.C. 2106 (338 U.S. at 560). See also United States v. Musquiz, 445 F.2d 963 (C.A. 5); Greene v. Massey, 546 F.2d 51, 55 (C.A. 5); United States v. Howard, 432 F.2d 1188, 1191 (C.A. 9).

Contrary to petitioner's contention (Pet. 7-8), Green v. United States, 355 U.S. 184, does not undercut the long established principle on which Bryan was based -- that there is no double jeopardy bar to retrial of one who successfully

seeks appellate review of his conviction.[2] Indeed, in Forman v. United States, 361 U.S. 416, decided after Green, the Court reaffirmed the validity of Bryan and went on to state (361 U.S. at 425):

> It is elementary in our law that a person can be tried a second time for an offense when his prior conviction for that offense has been set aside by his appeal. United States v. Ball, 163 U.S. 662, 672 (1896); see also Green v. United States, 355 U.S. 184, 189 (1957). * * * Even though petitioner be right in his claim that he did not request a new trial with respect to the portion of the charge dealing with the statute of limitations, still his plea of Double Jeopardy must fail. Under 28 U.S.C. 2106, the court of appeals has full power to go beyond the relief sought. [3]

Petitioner's reliance on United States v. Wiley, 517 F.2d 1212 (C.A. D.C.) is also misplaced. In Wiley the court of appeals recognized that "the Double Jeopardy clause prevents retrials in insufficiency cases in general, but permits such retrial where the accused has waived the constitutional guarantee by moving for a new trial." 517 F.2d at 1216. Furthermore, unlike in Wiley, the government presented a prima facie case against petitioner. Indeed, petitioner admitted committing the acts charged and claimed insanity.

2/ Green merely held that while defendant, who had been charged with first degree murder and found guilty of second degree murder, could be retried for second degree murder following his successful appeal of his conviction, the Double Jeopardy Clause barred retrying him for first degree murder since he had been in effect acquitted on that charge in his first trial.

3/ This Court's short per curiam decision in Sapir v. United States, 348 U.S. 373, is also not to the contrary. In that case there was a total lack of evidence with respect to an essential element of the offense charged. Moreover, as the Court observed in Forman, supra, Sapir made no motion for a new trial in the district court, a factor considered decisive in his case. 361 U.S. at 426.

If the district court on remand enters a judgment of acquittal, the issue presented here will be moot. On the other hand, if this Court holds in Abney v. United States, No. 75-6521, argued January 17, 1977, as we have there argued, that a pretrial order denying a motion to dismiss an indictment on double jeopardy grounds is not appealable prior to trial, this petition should be denied since the issue presented will not be ripe for review. If the district court orders a new trial, petitioner's double jeopardy claim, assuming he presents it to the district court, will be preserved for appeal should he again be convicted.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

DANIEL M. FRIEDMAN
Acting Solicitor General. */

MAY 1977.

*/ The Solicitor General is disqualified in this case.